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No. 10

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF TEXAS,
Petitioner,

v.

LARRY O'NEAL HALEY,
Respondent.

On Petition For Writ of Certiorari to the
Court of Appeals of Texas, Fifth District

PETITION FOR WRIT OF CERTIORARI

CRAIG WATKINS,
Criminal District Attorney
Dallas County, Texas

*MICHAEL R. CASILLAS,
Assistant Criminal District Attorney
Chief Prosecutor - Appellate Division

133 N. Industrial Blvd, LB19
Dallas, Texas 75207-4399
(214) 653-3600

* Counsel of Record

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

May counsel be deemed ineffective for acting in accord with the truth and an applicable ethical canon?

Does the Constitution of the United States countenance that a guilty plea may be rendered involuntary by counsel's performance that is in accord with the truth and an applicable ethical canon?

When counsel acts based on what his client has admitted to him is the truth and in harmony with an ethical canon applicable to attorneys as officers of the court/members of the bar, may an appellate court properly conclude that counsel rendered ineffective assistance under the United States Constitution despite the express language from this Court's opinions in Nix v. Whiteside, 475 U.S. 157 (1986); Strickland v. Washington, 466 U.S. 668 (1984); and United States v. Cronic, 466 U.S. 648 (1984)?

When counsel has acted based on his client's admission of the truth and in accord with an applicable ethical canon, may a state appellate court considering a claim of ineffective assistance under the United States Constitution properly conclude that counsel rendered ineffective assistance while completely ignoring the expressly-cited language of this Court's aforementioned binding precedents that would at least support a conclusion to the contrary?

May counsel's having acted based on his client's admission of the truth and in accord with an applicable ethical canon properly constitute grounds for a successful claim that the client's guilty plea was rendered involuntary by the allegedly ineffective assistance provided by counsel?

LIST OF PARTIES

The State of Texas and Larry O'Neal Haley are the only parties to this case. Sup. Ct. R. 14.1 (b)(West 2008).

CORPORATE DISCLOSURE STATEMENT

Since neither party is a nongovernmental corporation, no corporate disclosure statement is applicable to or required in this case. Sup. Ct. R. 29.6 (West 2008).

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I. When the claim of ineffective assistance by its very nature involves the potential tension between counsel's duty to his client and his duties under an applicable ethical canon as an officer of the court/ member of the bar, the conclusion of ineffective assistance under the Sixth Amendment cannot

properly be made by simply ignoring this Court's binding precedents regarding how canons of ethics limit the nature and scope of conduct in which counsel may and/or must engage 9

A. This Court has always acknowledged that the parameters of counsel's duties relative to providing effective assistance would be impacted by what counsel learned from the client and by counsel's ethical duties relative to what constituted the actual truth. 9

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C. Consistent with this Court's repeated recognition of how the ethical canons limit the nature and scope of the conduct in which counsel may and/or must engage, this Court should decide definitively whether conduct in conformity with an ethical canon may constitute grounds for a successful claim that ineffective assistance rendered a guilty plea involuntary. 14

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OPINION BELOW

The court of appeals for the Fifth District of Texas ("Fifth Court of Appeals") affirmed the trial court's having granted Haley's motion for new trial based on Haley's claim of ineffective assistance of counsel. [PA- I:18-23].[1] (State v. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804 (Tex. App. – Dallas May 28, 2008, pet. ref'd) (not designated for publication)).

JURISDICTION

The State's petition for writ of certiorari is timely filed on or before December 30, 2008. Sup. Ct. R. 13.1 (West 2008). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

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[1] "PA" refers to the appendix to the instant petition for certiorari review. "CR" refers to the clerk's record of pleadings and documents filed in the trial court. "RR-" followed by a 1, 2, 3, or 4 refers to the "Reporter's Record," the court reporter's transcription of the trial proceedings other than the hearing on the motion for new trial. "RR-MNT" refers to the court reporter's transcription of the hearing on the motion for new trial.

STATEMENT OF THE CASE

I. Facts of the Crime

Consistent with his attorney's advice regarding the only manner in which he might receive a probated sentence under the law, Haley pled guilty to having committed aggravated sexual assault of a child by having placed his mouth on the 10-year-old victim's female sexual organ. (RR-4: 16-27; RR-MNT: 36-37, 41-42). Haley also admitted that he had a prior felony conviction, which raised to 15 years the minimum prison sentence he could potentially receive. Tex. Penal Code §12.42(c)(1); Tex. Penal Code §22.021(a)(1)(B)(iii); Tex. Penal Code §22.021(e). While Haley claimed that he had been intoxicated at the time of the offense and had become intoxicated of his own accord, he admitted under oath that he had not been insane when he had committed the offense and that his counsel had informed him that his voluntary intoxication constituted no legal defense to the crime. (RR-4: 10-13).

While Haley tried to withdraw his guilty plea prior to his sentencing hearing, he lodged no substantive or procedural complaint regarding the manner in which the plea proceedings had been conducted in the trial court. (RR-3: 4). However, Haley did later file a motion for new trial claiming ineffective assistance of counsel. (CR: 37; RR-MNT: 1-54). The evidence developed at the hearing on Haley's motion for new trial formed the basis of the State's appeal of the trial court's order granting Haley's motion for new trial and provides the basis of the State's instant petition for writ of certiorari.

II. The Motion for New Trial Hearing

Haley's trial counsel was the only witness at the hearing on the motion for new trial. (RR-MNT: 1-54).

The trial court judge repeatedly and expressly found Haley's trial counsel credible, going so far as to state outright not only that she did not question his credibility, but also that she "believe[d] everything he's telling me." (RR-MNT: 43-44).

Haley's counsel repeatedly testified that Haley had admitted having perpetrated the crime upon the 10-year-old victim. (RR-MNT: 16, 21, 25, 28-29). Haley's counsel also established that he had consulted the State's file and that no substantive inconsistency had existed between Haley's admissions regarding the criminative facts and the victim's version thereof. (RR-MNT: 16, 18, 24).

According to Haley's counsel, Haley had harbored "no doubt in his own mind that he had done exactly what the girl said he did."[2] (RR-MNT: 25). Haley's counsel stated that he had made punishment-related issues the focus of his investigation because of his client's admissions and the consistency of his client's and the victim's versions of the criminative facts. (RR-MNT: 21, 23, 26, 35, 37).

In argument, the State cited language from this Court's opinion in Strickland v. Washington regarding how counsel has a duty to make a reasonable investigation or to make a reasonable decision that particular investigations are not necessary. (RR-MNT: 46). Accordingly, the basic constitutional issue was presented to the trial court at the first available opportunity. Sup. Ct. R. 14.1 (g)(I) (West 2008). Despite having this Court's binding precedent directly cited, the trial court expressly stated, "And I

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[2] During the sentencing phase, Haley himself admitted under oath in open court that he had no doubt in his own mind that he had perpetrated the offense against the female child victim. (RR-4: 14).

know your argument is that it's based on the circumstances if you've got a guy that's confessing, then what else can you do. No. That doesn't fly." (RR-MNT: 49).

III. The Direct Appeal

Before the Fifth Court of Appeals, the State cited Strickland, Cronic, Nix and Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct ("Rule 3.01"). Accordingly, the constitutional issue involving the tension between counsel's duty to provide effective assistance and his ethical duties as an officer of the court and member of the bar was presented to the appellate court at the first available opportunity. Sup. Ct. R. 14.1 (g)(I) (West 2008).

The State directed the Fifth Court of Appeals to Strickland's language regarding how "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. Moreover, the State also expressly cited Strickland's language regarding "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id.

Based on Cronic, the State argued to the effect that the right to effective assistance of counsel neither required nor permitted the criminal defense attorney to engage in – without regard to the ethical considerations incumbent upon attorneys as officers of the court/members of the bar – any type of unlimited or "no-holds-barred" conduct that might accrue to benefit the defendant regardless of the ethical deficiency inherent to such conduct. In conjunction with this proposition, the State relied upon Cronic's

nineteenth footnote and the express acknowledgment contained therein regarding how, "Of course the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of the client by attempting a useless charade." Cronic, 466 U.S. at 656 n. 19.

The State also directed the Fifth Court's attention to language from Nix establishing how the ethical canons applicable to attorneys as officers of the court/members of the bar played a role in the assessment of determining the limits of the type of conduct in which any criminal defense attorney may engage in rendering effective assistance of counsel. In regard to this point, the State specifically cited Nix's language regarding how the criminal defense attorney's conduct "is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth." Nix, 475 U.S. at 166. Additionally, the State cited Nix's accompanying language regarding how the criminal defense attorney "is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." Id.

As noted above, in conjunction with Nix and Cronic and their recognition of the interaction between the constitutional right to the effective assistance of counsel and the ethical canons applicable to attorneys as officers of the court/members of the bar, the State also cited Rule 3.01. According thereto, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Tex. Disciplinary R. Prof'l Conduct 3.01, reprinted in Tex. Gov't Code, tit. 2, subtit. G app. A. [PA-III: 25].

Based on the combination of Rule 3.01 and the

rationales of Strickland, Cronic, and Nix, the State argued that Haley's counsel should not be deemed ineffective for refraining from conducting any additional investigation (beyond confirming the substantively identical nature of Haley's and the victim's descriptions of the criminative facts) designed to portray the 10-year-old victim as a liar because Haley had informed his counsel that the victim was telling the truth in her allegation of having been sexually assaulted by Haley. Based on Rule 3.01, the State argued that Haley's admissions to his counsel regarding the truth of the victim's allegations prevented Haley's counsel from possessing any non-frivolous basis for forming the reasonable belief that the issue of the victim's credibility should be controverted.

In affirming the decision of the trial court, the Fifth Court of Appeals cited Strickland twice, but failed completely to acknowledge the cited portions of Strickland that supported the State's position herein. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *1-8.[3] Moreover, the Fifth Court of Appeals wholly ignored Cronic, Nix, and Rule 3.01 in affirming the trial court's decision, and did so with total disregard for the State's repeated and express citations thereof. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *1-8.

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[3] The Fifth Court's opinion is reproduced in the appendix hereto. The reproduction of the Fifth Court's opinion contains multiple sets of brackets ([ ]), which themselves contain an asterisk (*) and a number from one to eight (1-8). The brackets containing the asterisk and number represent the pagination of the Fifth Court's opinion as it appears in the on-line version of the LEXIS legal database.

IV. The Petition for Discretionary Review

The State timely filed its Petition for Discretionary Review (PDR) on June 20, 2008. The State's PDR cited Hernandez v. State, 988 S.W.2d 770, 771 (Tex. Crim. App. 1999) for the proposition that claims of ineffective assistance of counsel in Texas required an assessment under the jurisprudence of this Court interpreting the United States Constitution (as opposed to the Texas Constitution). The State additionally cited Tex. R. App. P. 47.1 and Garrett v. State, 220 S.W.3d 926, 928-29 (Tex. Crim. App. 2007) for the proposition that the State's having expressly raised issues based on the combination of principles from Strickland, Cronic, Nix, and Rule 3.01 required the Fifth Court of Appeals to at least assess Haley's counsel's performance in light of Rule 3.01 and the principles cited by the State from Strickland, Cronic, and Nix. Despite the State's arguments showing how the Fifth Court of Appeals had conducted its federal constitutional analysis by completely ignoring the overwhelming majority of this Court's authority the State had cited, the Texas Court of Criminal Appeals refused the State's PDR on October 1, 2008. [PA-II: 24].[4]

REASONS FOR GRANTING THE WRIT

The writ should be granted in this case because the Fifth Court of Appeals and the trial court have purported to analyze a claim of ineffective assistance under the United States Constitution while completely ignoring not only the applicable ethical canon cited (*i.e.*, Rule 3.01), but also this Court's binding precedents (*i.e.*, Nix, Cronic, and to a lesser degree Strickland) regarding the type of conduct in which counsel must or may engage in order to

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[4] Judge Meyers indicated his willingness to grant the State's PDR

render effective assistance under the Sixth Amendment to the United States Constitution. Accordingly, the granting of the writ is merited because the Fifth Court of Appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10 (c) (West 2008).

Additionally, all lower-level courts conducting analyses under the United States Constitution have a duty to apply this Court's jurisprudence interpreting the relevant provision or provisions of the United States Constitution to the constitutionally-related question or questions presented. In this regard, the writ should also be granted because this Court's binding precedents should be accorded more respect than being ignored outright, read selectively, or otherwise treated as if they do not exist, had not been cited, or do not support the propositions for which they had been cited.

Finally, the writ should also be granted because the unique facts of this case provide this Court with the opportunity to favor the bench and bar with additional guidance regarding the "scope and limits" of the conduct required of the criminal defense attorney who happens to occupy the same or a similar position as that occupied by Haley's counsel herein. In this regard, the writ should be granted because the instant case constitutes the "state-court trial" in which this Court "need[s] to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on" the conduct of the criminal defense attorney who occupies the same position Haley's counsel did in this case. Nix, 475 U.S. at 165-66.

A. **From the very promulgation of the test for effective assistance of counsel, this Court's jurisprudence has acknowledged that the parameters of counsel's duties would be impacted not only by what counsel learned from the client, but also by counsel's ethical duties relative to what actually constituted the objective truth.**

Prior to this Court's issuance of the opinion in Strickland, this Court had never "elaborated on the meaning of the constitutional requirement of effective assistance of counsel in the latter class of cases -- that is, those presenting claims of 'actual ineffectiveness' " Strickland, 466 U.S. at 686. While this Court in Strickland set out the two-prong test for assessing claims of effective assistance of counsel, this Court also stated, "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 691. This Court amplified this point by also writing, "And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Id.

Accordingly, Strickland itself establishes the proposition that the criminal defense attorney's duty to provide effective assistance of counsel is impacted by what the criminal defense attorney learns from the client. Moreover, this principle from Strickland is entirely consistent with language from Cronic, an opinion issued the very same day as Strickland. Cronic, 466 U.S. at 648. According to the nineteenth footnote of Cronic, "Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of the client by attempting a useless charade." Id. at 656 n. 19 (citations omitted).

Considered in conjunction, the aforementioned passages from Strickland and Cronic demonstrate that – from the very day of the promulgation of the two-pronged test for assessing claims of ineffective assistance of counsel – the parameters of counsel's duty to provide effective assistance were impacted not only by the content of the client's conversations with counsel, but also by counsel's ethical duties relative to whatever actually constituted the objective truth. Strickland, 466 U.S. at 691; Cronic, 466 U.S. at 656 n. 19.

B. **Starting from the very promulgation of the test for effective assistance of counsel, this Court's jurisprudence has repeatedly demonstrated this Court's recognition that the ethical canons applicable to all attorneys as both officers of the court and members of the bar fulfill some purpose in the assessment of claims of ineffective assistance of counsel.**

In the seminal Strickland opinion, this Court expressly noted how, "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980)("The Defense Function"), are guides to determining what is reasonable, but they are only guides." Strickland, 466 U.S. at 688. Approximately twenty-one-and-one-half months after issuing Strickland, this Court in Nix cautioned against intruding "into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts." Nix, 475 U.S. at 165.

In regard to the interaction between state ethical

canons and the Sixth Amendment right to effective assistance of counsel relative to the type and level of conduct in which the criminal defense attorney may engage, the Nix court further stated

> In some future case challenging attorney conduct in the course of a state court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.

Id. at 165-66.

While the Nix court declined to describe in any detail the manner in which the ethical canons would impact the right to effective assistance of counsel under the Sixth Amendment, the Nix court summarized the limits placed upon counsel's duty by the ethical canons by declaring

> Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for the truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. This principle has consistently been recognized in most unequivocal terms by expositors of the norms of professional conduct since the first Canons of Professional Ethics were adopted by the American Bar Association in 1908.

Id. at 166.

In this case, the State expressly and repeatedly cited not only Strickland, Nix, and Cronic, but also Rule 3.01 of the Texas Disciplinary Rules of Professional Conduct. According to Rule 3.01, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." Tex. Disciplinary R. Prof'l Conduct 3.01, reprinted in Tex. Gov't Code, tit. 2, subtit. G app. A. [PA-III: 24].

Despite the State's repeated citations of Strickland, Nix, Cronic, and Rule 3.01, the Fifth Court of Appeals reached its conclusion in this case without even mentioning – much less addressing – how Rule 3.01, Cronic, and Nix impacted the ineffective assistance analysis. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *1-8. While the Fifth Court of Appeals mentioned Strickland in passing for some of its most general principles, the Fifth Court of Appeals wholly ignored the portions of Strickland that supported the State's position herein. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *1-8.

However, under a combination of the rationales cited by the State from Strickland, Cronic, and Nix, the Fifth Court of Appeals had a duty to conduct its ineffective assistance analysis in light of counsel's ability to rely on Haley's admissions and counsel's ethical duties to avoid controverting the issue of the victim's credibility when Haley's admissions denied counsel any basis for forming a reasonable belief in any non-frivolous grounds for controverting the victim's credibility. That Haley's counsel's having chosen to refrain from trying to controvert the victim's credibility was in complete accord with Rule 3.01 is shown by counsel's testimony about not only the substantively identical nature of the victim's version and Haley's admissions regarding the criminative facts, but also about the complete lack of any indication showing that the

victim's allegations had been the result of any influence or persuasion by the victim's mother upon the victim. (RR-MNT: 16, 18, 21-22, 24-25, 28-29).

In this regard, the conclusions of the trial and appellate court amount to conclusions that Haley's counsel had a duty to attempt to portray the victim as a liar when he had no basis for believing that she was a liar, which is wholly inconsistent with Rule 3.01 and, by extension, Cronic's prohibition upon "do[ing] what is impossible or unethical." Cronic, 466 U.S. at 656 n.19. Moreover, since Haley's counsel acted based on the truth as he had learned it from Haley (in combination with confirmation thereof obtained from the review of the contents of the State's file), the conclusions of the trial and appellate courts to the effect that counsel had a duty to attempt to portray the victim as a liar cannot in any way be reconciled with Nix's language, which might explain the Fifth Court of Appeals' having completely and utterly ignored the Nix opinion's cited language in affirming the trial court's decision. Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *1-8.

In short, once Haley's counsel confirmed that the victim's allegations were true, how can it be said that any conduct by counsel to portray the victim as a liar would have been "compatible with the very nature of a trial as a search for the truth"? Nix, 475 U.S. at 166. Moreover, the Fifth Court of Appeals' failure to comply with its duty of at least conducting its assessment in accord with this Court's cited authorities and Rule 3.01 was rendered only more egregious by the combination of the trial court's having repeatedly found counsel credible and counsel's having established that he acted as he did based on having confirmed that no substantive difference existed between Haley's and the 10-year-old victim's versions of the criminative facts. (RR-MNT: 18, 28-29, 43-44).

For all the aforementioned reasons, this Court's exercise of its certiorari jurisdiction is fully justified because the Fifth Court of Appeals has either "decided an important federal question in a way that conflicts with relevant decisions of this Court" or "has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10 (c) (West 2008). Since Haley's counsel's conduct was entirely consistent with Rule 3.01 and the cited portions of Strickland, Nix, and Cronic, this Court should address this case to conclude that Haley's counsel did not render ineffective assistance under this Court's relevant precedents interpreting the Sixth Amendment to the United States Constitution. However, even if Haley's counsel's conduct constituted ineffective assistance despite its consistency with Rule 3.01 and the cited portions of Strickland, Cronic, and Nix, this Court should still address this case to explain how and why Haley's counsel's conduct constituted ineffective assistance despite that conduct's having been consistent with Rule 3.01 and the cited portions of Strickland, Nix, and Cronic.

Regardless of which conclusion a majority of this Court should ultimately reach, this case still constitutes the state-court case referred to by the Nix court, the case in which this Court "need[s] to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on" the conduct attorneys may or must engage in to render effective assistance of counsel consistent with the ethical duties incumbent upon all attorneys as officers of the court and members of the bar. Nix, 475 U.S. at 165-66.

C. **Consistent with the aforementioned recognition in this Court's jurisprudence regarding how the ethical canons limit or otherwise in some way impact what**

counsel must do to render effective assistance, any attorney's having acted in accord with an applicable ethical rule should not constitute proper grounds for a successful claim that ineffective assistance rendered involuntary a plea of guilty.

After having ignored the State's citations to Rule 3.01, the entirety of Cronic and Nix, and the specific portions of Strickland that supported the State's position, the Fifth Court of Appeals concluded that Haley had shown prejudice in regard to his entry of his guilty plea because Haley had "stated in his affidavit that he pleaded guilty because his trial attorney performed no investigation." Haley, No. 05-07-01036-CR, 2008 Tex. App. LEXIS 3804, at *7-8. However, Haley's counsel's conduct was in complete accord with Rule 3.01, Cronic's language regarding how counsel may not do what is impossible or unethical, Nix's language regarding how counsel's conduct is limited to that which is compatible with a trial as a search for the truth, and Strickland's language that counsel may rely on the client's admissions in choosing how to focus his investigatory efforts.

Accordingly, the Fifth Court of Appeals has in effect concluded that an accused's right to effective assistance of counsel encompasses the right to have counsel engage in conduct which counsel reasonably regards as not only unethical in nature, but also of impotent effect in that such conduct – in light of the accused's admissions of the truth of the victim's allegations – cannot provide any non-frivolous grounds for controverting the credibility of the victim of the crime charged. Clearly, that conclusion cannot be reconciled with this Court's language from Cronic that "the Sixth Amendment does not require that counsel do what is impossible or unethical" nor the language from Nix limiting counsel's conduct to that which is "compatible with the very nature of a trial as a search for the truth." Nix, 475 U.S. at 166; Cronic, 466 U.S. at 656 n. 19.

Because the Fifth Court of Appeals has decided the constitutional question presented in such a manner as to conclude that an accused's right to effective assistance of counsel includes the right to have counsel engage in conduct that violates an applicable ethical rule, the Fifth Court of Appeals has decided an important question of federal law in a way that conflicts with this Court's relevant decisions in Cronic and Nix. Moreover, the conduct of the Fifth Court of Appeals provides compelling grounds for this Court's exercise of its certiorari jurisdiction. Sup. Ct. R. 10 (c) (West 2008). Furthermore, even if this Court were to conclude that the Fifth Court of Appeals did not decide this case's important federal question incorrectly, this Court's exercise of its certiorari jurisdiction is still compelled thereby, in that this Court should settle the important federal question presented by defining "with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct [in which counsel may or must engage]." Nix, 475 U.S. at 165-66.

CONCLUSION

For the foregoing reasons, this Court should grant the State's petition for writ of certiorari and provide the bench and bar with more-detailed guidance regarding whether an attorney whose conduct is based on the client's admissions and is in complete accord with both the objective truth and an applicable ethical canon thereby provides ineffective assistance of counsel that renders involuntary the client's plea of guilty.

Respectfully submitted,

CRAIG WATKINS
Criminal District Attorney
Dallas County, Texas

Michael R. Casillas

*MICHAEL R. CASILLAS,
Assistant Criminal District
Attorney, Chief Prosecutor -
Appellate Division

* Counsel of Record

133 N. Industrial Blvd., LB19
Dallas, Texas 75207-4399
Tel: (214) 653-3600
Fax: (214) 653-3643
Email:

ATTORNEYS FOR PETITIONER

APPENDIX

I. Opinion Below

AFFIRM and Opinion Filed May 28, 2008

2008 Tex. App. LEXIS 3804, *

In The
Court of Appeals
Fifth District of Texas at Dallas

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No. 05-07-01036-CR

.....

THE STATE OF TEXAS, Appellant
V.
LARRY O'NEAL HALEY, Appellee

.....

On Appeal from the 204th Judicial District Court
Dallas County, Texas
Trial Court Cause No. F05-72800-RQ

.....

[*1] OPINION
Before Justices Wright, O'Neill, and Francis
Opinion By Justice O'Neill

The State appeals an order granting appellee Larry O'Neal Haley a new trial based on ineffective assistance of counsel. In its sole issue, the State contends the trial court abused its discretion in granting Haley a new trial. For the following reasons, we affirm the trial court's order.

The grand jury indicted Haley for aggravated sexual assault of a child. The case was set for trial three times. The third time the case was set, the trial court held a pre-trial hearing. At the hearing, Haley told the trial court

that he wanted to plead not guilty, but he had not been able to discuss the case with his attorney and had only met with him once since their first meeting. He asked the trial court to appoint new counsel because his attorney was unprepared. The trial court refused. The trial court recessed to allow Haley to speak to his attorney. After Haley discussed the case with his attorney, he informed the trial court he wanted to plead guilty. The trial court accepted [*2] Haley's plea and passed the case for sentencing. Before he was sentenced, Haley filed a motion to requesting [sic] the trial court to withdraw his guilty plea and appoint new counsel. Both requests were denied. At his later sentencing hearing, Haley admitted committing the offense, but claimed he did not recall doing so due to voluntary intoxication. Haley was sentenced to fifteen years' confinement.

New counsel was appointed for appeal. Haley then filed a motion for new trial asserting ineffective assistance of trial counsel. Specifically, he asserted counsel failed to prepare for trial, failed to investigate, and failed to communicate with Haley. Haley claimed he only pleaded guilty because he knew counsel was unprepared and felt he had no choice. After conducting a hearing, the trial court granted Haley's motion for new trial. The State appeals.

We review the granting of a new trial for an abuse of discretion. *Lewis v.* State, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995). An abuse of discretion occurs when the trial court's decision was arbitrary or unreasonable. *State v. Boyd,* 202 S.W.3d 393, 401 (Tex. App.-Dallas 2006, pet. ref'd). An appellate court is not to substitute its judgment for that of [*3] the trial court; rather the appellate court's role is to examine the record to determine whether the trial court granted a new trial without reference to any guiding rules or principles or, in other words, whether the

trial court's decision was arbitrary or unreasonable. *See Lewis*, 911 S.W.2d at 7. The appellate court is to presume the trial court correctly granted a new trial, and the State has the burden to establish the contrary. *See Lee v. State*, 167 Tex. Crim. 608, 322 S.W.2d 260, 262 (1958); *Boyd*, 202 S.W.3d at 401.

To prevail on an ineffective assistance of counsel claim, the defendant must show (1) deficient performance, and (2) prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Kober v. State*, 988 S.W.2d 230, 232 (Tex. Crim. App. 1999). Ordinarily counsel should not blindly rely on the veracity of either his client's version of the facts or witness statements in the State's file. *McFarland v. State*, 928 S.W.2d 482, 501 (Tex. Crim. App. 1996), *overruled on other grounds by Moseley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998). Rather, "counsel **[*4]** has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. A decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *McFarland*, 928 S.W.2d at 501. To satisfy the prejudice prong, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. In a guilty plea case, a defendant must show that but for counsel's errors he would not have pleaded guilty. *Kober*, 988 S.W.2d at 232.

In his affidavit attached to the motion for new trial, Haley stated that he first met with his attorney in December 2005 after counsel was initially appointed. Haley did not see his attorney again until March 2007 when the case was set for trial (for the third time). Haley stated he had written to his attorney fourteen times, but the only

correspondence he had received from his attorney were two letters concerning trial settings and one letter informing him of a plea bargain offer. Haley had informed [*5] his attorney of certain mental difficulties and had asked for a psychiatric evaluation. According to Haley, his attorney had never talked to him about the facts of the case and had never asked about his "witnesses." Haley stated that he decided to plead guilty because he knew the case was set for trial and his attorney had done no preparation.

At the hearing the motion for new trial [sic], Haley's trial attorney testified that he knew Haley had initially wanted to plead not guilty before a jury. Nevertheless, Haley's counsel did not request an investigator, speak to any witnesses, or subpoena any CPS records. He explained that he did not perform any investigation because he had reviewed the State's file, was aware of no inconsistencies in the child's story, and Haley had made certain admissions to him "substantially" admitting the offense.

There is evidence that Haley had been hospitalized for mental illness and suffers from severe depression, polysubstance dependence, and is mildly mentally retarded. Haley at one point told his attorney he was not sane at the time of the offense, but counsel independently determined Haley was both sane and competent at the time of the offense. However, it [*6] does not appear counsel performed any independent investigation to make this determination. Although counsel was aware Haley had been treated at MHMR, he did not request any information from MHMR.

In its findings on the motion for new trial, the trial court concluded counsel's failure to conduct any independent investigation, failure to investigate the child's credibility, failure to investigate Haley's mental disorders and

overall failure to subject the State's case to any adversarial testing constituted ineffective assistance of counsel. It further found counsel's failures rendered Haley's plea involuntary and granted him a new trial.

After reviewing the record, we cannot conclude the trial court abused its discretion. Haley was charged with a first degree felony offense. Although the case had been set for trial three times and counsel was aware of Haley's desire to plead not guilty, trial counsel did no independent investigation other than reviewing what the State had shown him. The State asserts trial counsel's failure to conduct any independent investigation was justified based upon admissions Haley made to his attorney. In a letter to his attorney, Haley admitted committing certain [*7] behavior suggesting his guilt for the charged conduct. However, Haley did not recall committing the specific allegations in the indictment. Moreover, the record shows Haley suffered from mental illness and was mildly mentally retarded, yet counsel did nothing to obtain an evaluation of Haley or even subpoena his medical records. The trial court could have determined, under the totality of the circumstances presented here, it was not reasonable for trial counsel to have relied on Haley's vague admissions in deciding to perform no independent investigation. We cannot conclude the trial court abused its discretion in determining counsel's conduct fell below an objective standard of reasonableness.

The State also contends Haley failed to prove prejudice. The State misconstrues Haley's burden to establish prejudice in this case. Generally a failure to investigate will require reversal of a conviction only if the defendant can show favorable evidence existed. However, in a guilty plea case, a defendant establishes prejudice by showing his guilty plea was not voluntary due to ineffective assistance. Haley stated in his affidavit that he only pleaded

guilty because his trial attorney performed [*8] no investigation. The circumstances of Haley's plea support his assertion. The trial court was free to believe Haley. We cannot conclude the trial court abused its discretion in granting Haley a new trial. We resolve the sole issue against the State and affirm the trial court's order.

/s/ Michael J. O'Neill
MICHAEL J. O'NEILL
JUSTICE

Do Not Publish
Tex. R. App. P. 47
071036F.U05

II. Denial of Discretionary Review

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

Wednesday, October 01, 2008
Re: Case No. PD-0928-08
COA#: 05-07-01036-CR
STYLE: STATE OF TEXAS

On this day, the State's petition for discretionary review has been refused.

JUDGE MEYERS WOULD GRANT.

Louise Pearson, Clerk

DISTRICT ATTORNEY DALLAS COUNTY
CRAIG WATKINS

APPELLATE SECTION
133 N. INDUSTRIAL BLVD., L.B. 19
DALLAS, TEXAS 75207

III. U.S. Const. amend. VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

IV. Tex. Disciplinary R. Prof'l Conduct 3.01

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous."

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No. 08-808

Supreme Court, U.S.
FILED
JAN 30 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF TEXAS,

Petitioner

v.

LARRY O'NEAL HALEY,

Respondent

On Petition for Writ of Certiorari to the Court of Appeals of Texas, Fifth District

BRIEF IN OPPOSITION

William R. Barr
Counsel of Record
P.O. Box 595153
Dallas, Texas 75359
(214) 417-4961

Counsel for Respondent

QUESTIONS PRESENTED

The Petitioner's "Questions Presented" are factually inaccurate, erroneously suggesting circumstances in which a criminal defense attorney "knows" that his client has admitted the "truth" of the allegations against him and is prohibited by a state professional rule of conduct from ". . . defend[ing] a proceeding, or . . . controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous"; and is, therefore, relieved from the duty to conduct any independent investigation.

Considering the opinion below, more accurate statements of the questions presented would be:

Would a defense attorney's refusal to conduct any independent investigation of (1) the facts of a case set for trial and (2) the mitigation facts of his client's mental disabilities not constitute ineffective assistance because the attorney believed that the client had "substantially" admitted the offense and a state rule of professional responsibility dictates that he not defend a proceeding or controvert an issue that he reasonably believes is frivolous?

Is an accused's guilty plea rendered involuntary by his counsel's failure to do any investigation beyond a review of the prosecution file when the accused has insisted on trial?

Does an accused's "vague admission" that does not include the specifics in the indictment constitute "truth" (or a "reasonable basis") such that the criminal defense attorney is relieved of his duty to make an independent investigation?

CORPORATE DISCLOSURE STATEMENT

Neither party is a nongovernmental corporation; therefore, no corporate disclosure statement is required in this case. Sup. Ct. R. 29.6 (West 2008)

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REASONS FOR DENYING THE WRIT

I. The Petitioner has misstated essential facts in this case, including whether the Respondent admitted the "truth" of the criminal charges against him. The supposed "admission" (referred to by the Petitioner as "the truth") was debunked by both the trial court and the state court of appeals as "vague." Petitioner further omits or misstates numerous other facts that change the factual context for the writ.

II. Even assuming the validity of Petitioner's assumption that Respondent had admitted the "truth," Petitioner's citations to precedents of this Court are not supportive of his argument that an admission (or confession) coupled with a state rule of professional conduct that proscribes an attorney's ". . . defend[ing] a proceeding, . . . controvert[ing] an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous" excuses counsel's complete failure to investigate.

I. Misstatements of Facts

The Missing Facts

Petitioner has failed to present a reasonable factual context of this case. This Court has emphasized the importance of the facts in relation to the legal question:

> The requirement ... tends to assure that the legal questions presented to the court will be resolved not in the rarified atmosphere of a

> debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.
>
> *Valley Forge Christian Academy v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)

Petitioner begins his recitation of the facts with Respondent pleading guilty (P:2) but fails to include the fact that Respondent had been set for trial two times over the course of the previous 21 months and that he told his trial counsel that he wanted to set the case for trial from the outset of his representation. (O: Also missing was the fact that counsel "did no independent investigation." (*see* O:*6/ P:22)

Respondent's trial counsel was unable to recall (or find in his file) any visits with Respondent in the jail to contradict Respondent's complaint that counsel had seen him only one time besides the initial interview. (MNT:26) Counsel had previously testified in the hearing that he "[t]alked with [Respondent] on *numerous* occasions through all of these twists and turns about what his position was as related to what the little girl was saying happened." (MNT:24) [emphasis added]

Also not included in Petitioner's recitation of the facts was the undisputed evidence that Respondent suffered from bipolar disorder, mild mental retardation, and polysubstance abuse. (MNT:15)

In Petitioner's Appendix I: The Opinion Below (P: 18), the Fifth District Court of Appeals summarized

Respondent's affidavit with the motion for new trial:

> In his affidavit attached to the motion for new trial, [Respondent] stated that he first met with his attorney in December 2005 after counsel was initially appointed. [Respondent] did not see his attorney again until March 2007 when the case was set for trial (for the third time). [Respondent] stated he had written to his attorney fourteen times, but the only correspondence he had received from his attorney were two letters concerning trial settings and one letter informing him of a plea bargain offer. [Respondent] had informed his attorney of certain mental difficulties and had asked for a psychiatric evaluation. According to Haley, his attorney had never talked to him about the facts of the case and had never asked about his "witnesses." Haley stated that he decided to plead guilty because he knew the case was set for trial and his attorney had done no preparation. (O:*4/P:20-1)

Petitioner suggests that counsel had stated that "he had made punishment-related issues the focus of his investigations because of his client's admissions and the consistency of his client's and the victim's versions of the criminative facts." (P:3) The record merely reflects that counsel stated, "[T]here were no factual disputes about what the little girl was saying happened and that she -- she was consistent. I never -- there was not a hint of inconsistency that I was ever aware of from any source --" (MNT:16) Counsel

states that he was comparing what the alleged victim said "happened at the offense with, of course, what [Respondent] is telling me that happened" (MNT:18), but counsel never offers his specific conclusions from the comparison. The third page of the motion hearing cited by Petitioner only presents the contradicted position that he had "talked with [Respondent] on *numerous* occasions...." [*see supra*]

A Vague "Admission" is Not the "Truth"

Suggesting that Respondent's trial counsel testified "repeatedly" that Respondent had "admitted perpetrating the crime," Petitioner disguises the fact that there was only one vague "admission" in a letter (undated) allegedly from Respondent. The Petitioner states that "[Respondent]'s counsel repeatedly testified that [Respondent] had admitted having perpetrated the crime upon the 10-year-old victim" citing four places in the reporter's record for the motion for new trial hearing. (P:3) These instances were indeed Respondent's *trial counsel* repeatedly saying that Respondent had admitted to him that what the child had said was true, but when pressed, trial counsel had no specific evidence of an admission except for a vague statement in a letter, evaluated by the Texas Fifth District Court of Appeals:

> In a letter to his attorney, [Respondent] admitted committing certain behavior suggesting his guilt for the charged conduct. However, [Respondent] did not recall committing the specific allegations in the indictment. Moreover, the record shows [Respondent] suffered from mental illness and was mildly mentally retarded, yet

> counsel did nothing to obtain an evaluation of [Respondent] or even subpoena hismedical records. The trial court could have determined, under the totality of the circumstances presented here, it was not reasonable for trial counsel to have relied on [Respondent]'s vague admissions in deciding to perform no independent investigation. (O:*6-7/P:22)

In the hearing on the motion for new trial, the State's contention that Respondent had admitted to the offense occasioned the trial court to respond that she had heard no admission by Respondent "except that he was so wasted[,] he doesn't remember what happened." (MNT:45)

Respondent's trial counsel also stated that he had "talked with the [Respondent] on numerous occasions" (MNT:24) but was unable to pin point the dates of these conversations or offer any refutation of Respondent's claim that trial counsel had only seen him one time after the initial interview, despite the case being set for trial three times over the course of 21 months. (MNT:26)

Failure to Investigate Respondent's Documented Diagnoses of BiPolar Disorder and Mental Retardation

Petitioner suggested in his argument that Respondent's trial counsel had "made punishment-related issues the focus of his investigation because of his client's admissions and the consistency of the criminative facts." (P:3) However, in the hearing on the motion for new trial, when asked if he thought putting a document that listed Respondent's diagnoses into evidence was "sufficient," counsel

stated that he felt the diagnoses were "not in dispute" (MNT:30) and that they didn't "need any development at all [by a professional]" (MNT:31) and that it was "[his] decision not to have that -- that additional work done." (MNT:40)

Counsel had known that Respondent had these diagnoses "early on" (MNT:31), that Respondent had sent him documentation of his diagnoses (MNT:32) which he had returned to Respondent without making copies for his records. (MNT:12) When asked in cross-examination whether "as an officer of the court" counsel felt that "[Respondent] was competent to stand trial," he answered, "Yes. I thought [Respondent] was entirely competent to stand trial." (MNT:38) Previously in the hearing, counsel had explained why he had not requested a competency examination of Respondent: "In terms of competency to stand trial, *in my opinion*, he was entirely competent to stand trial." (MNT:14) [emphasis added] Counsel also detailed why he had not submitted a request to determine if Respondent had been insane at the time of the alleged incident:

> He was at one time claiming he was insane at the time of the offense. It was clear to me that he was not insane at the time of the offense nor there was any -- any evidence, in my opinion, that showed he was insane at the time of the offense. (MNT:14)

The court of appeals noted his failure to perform any investigation on these matters:

> There is evidence that [Respondent] had been hospitalized for mental illness and

> suffers from severe depression, polysubstance dependence, and is mildly mentally retarded. [Respondent] at one point told his attorney he was not sane at the time of the offense, but counsel independently determined [Respondent] was both sane and competent at the time of the offense. However, it does not appear counsel performed any independent investigation to make this determination. Although counsel was aware [Respondent] had been treated at MHMR, he did not request any information from MHMR. (O:*5-6;P:21)

The trial court in its findings of fact and conclusions of law, found counsel's "failure to conduct any independent investigation, failure to investigate the child's credibility, failure to investigate [Respondent's] mental disorders and overall failure to subject the State's case to any adversarial testing constituted ineffective assistance." (O:*6; P:22)

The state court of appeals held that "[Respondent] stated in his affidavit that he only pleaded guilty because his trial attorney performed no investigation. The circumstances of [Respondent]'s plea support his assertion. The trial court was free to believe [Respondent]." (O:*7-8; P:22-3)

II. Petitioner's cited precedents are inapplicable to these facts

In *Nix v. Whiteside*[2], the issue was whether counsel was ineffective for refusing to assist an

[2] 475 U.S. 157 (1986)

accused offer perjured testimony. In that case, this Court explained

> In *Strickland*, we recognized counsel's duty of loyalty and his "overarching duty to advocate the defendant's cause." *Ibid.* Plainly, that duty is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain the objectives of the client, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. *Nix. at* 166

There was no suggestion in this case that Respondent ever suggested he was intending on offering perjured testimony or "otherwise violating the law." Contrary to the record of Respondent's counsel's failures to investigate, the counsel for Nix began his investigation as soon as he was appointed. *See Nix at* 160. Here, investigating the complaining witness's records with Child Protective Services was "legitimate, lawful conduct," and *Nix* holds Respondent's counsel obligated to "take all reasonable lawful means to attain the objectives of the client" short of "assisting the client in presenting false evidence or otherwise violating the law." *Id. at* 166

> In his affidavit attached to the motion for new trial, [Respondent] stated that he first met with his attorney in December 2005 after counsel was initially appointed. [Respondent] did not see his attorney again until March 2007 when the case was set for trial (for the third time). [Respondent] stated he had written to his attorney fourteen times, but the only correspondence he had

received from his attorney were two letters concerning trial settings and one letter informing him of a plea bargain offer. [Respondent] had informed his attorney of certain mental difficulties and had asked for a psychiatric evaluation. According to [Respondent], his attorney had never talked to him about the facts of the case and had never asked about his "witnesses." [Respondent] stated that he decided to plead guilty because he knew the case was set for trial and his attorney had done no preparation. (O:*4/P:20-1)

Ethical Duties

While Petitioner focuses on trial counsel's purported duty under Texas Rules of Professional Conduct not to "bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." TEX. DISCIPLINARY R.PROF.CONDUCT 3.01, he fails to consider the rules of conduct more specifically tailored to criminal defense. In *Williams v. Taylor*[1], this Court cited to the ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 DUTY TO INVESTIGATE:

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction, The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of

> the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

The *Williams* opinion keeps the focus on the reasonableness of the attorney's "tactical" decisions as to not investigating despite the attorney's obligation to conduct a thorough investigation of the defendant's background." *Williams at* 396. In this case, counsel's decision not to further investigate was because he believed that the court would "know what to do with it."

CONCLUSION

Petitioner's assumption that Respondent admitted the charges against him contradicts the record. The Texas Fifth District Court of Appeals regarded the statement counsel read from an undated letter to be to be less than an admission of the offense, finding that "[Respondent] did not recall committing the specific allegations in the indictment." (O:*7/P:22) Both the trial court and the state court of appeals described the statement as less than convincing. (MNT:45; O:*7/P:22)

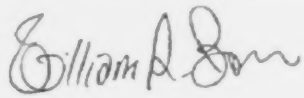
Without the premise that Respondent specifically and completely confessed to the alleged offense (the "truth"), Petitioner has no basis for the invocation of the Texas Rule of Professional Conduct prohibiting counsel from defending a proceeding that the lawyer "reasonably believes" is "frivolous." Save the vague statements in the undated, alleged letter from Respondent, Petitioner's arguments about the quantum and sufficiency of Respondent's alleged

admission are entirely the unsubstantiated assertions of Respondent's counsel.

To grant this petition would open the door to any criminal defense attorney who has failed to make reasonable, independent investigation of a case to be exempted from his duty to his client by merely asserting that "My client admitted everything to me. He's guilty, so I had no duty to do any investigation of his case."

For the foregoing reasons, this Court should deny the State of Texas's Petition for Writ of Certiorari.

Respectfully submitted,



William R. Barr
Counsel of Record
P.O. Box 595153
Dallas, Texas 75359
(214) 417-4961
beezecorp@earthlink.net

Counsel for Respondent
Larry O'Neal Haley